Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
	)	
Distribution of 2004, 2005, 2006, 2007, 2008 and 2009 Cable Royalty Funds	)	Docket No. 2012-6 CRB CD 2004-2009 (Phase II)
	)	
In the Matter of	)	
	)	
Distribution of 1999-2009 Satellite Royalty Funds	)	Docket No. 2012-7 CRB SD 1999-2009 (Phase II)
	)	

INDEPENDENT PRODUCERS GROUP'S CONSOLIDATED RESPONSE TO MPAA AND SDC PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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MPAA PFF ¶15: The Kessler Cable Stations excludes Canadian-originated and Mexican-originated stations, despite the retransmitted broadcasts derived therefrom qualifying for the distribution of cable retransmission royalties. 17 U.S.C. §111. The Kessler Cable Stations and Kessler Satellite Stations were admittedly not selected by random sample, but by an unidentified "combination of fees generated and distant subscribers." Exh. 8010 at 11.

MPAA PFF ¶26: The "selected geographic markets" in which Nielsen household meter data is collected is only in the 56 largest U.S. markets. Tr. at 477:1-16, 181:18-25; Exh. 8002, App. B.

MPAA PFF ¶27: MPAA witnesses assert that Nielsen meter data is superior to diary data, while SDC witnesses asserts that Nielsen diary data is superior to meter data. *Cf.* Tr. at 302 (Lindstrom) *with* Exh. 7001 at 13 (Sanders).

MPAA PFF ¶34: See generally, IPG PFF at Section II.E. Notwithstanding his written testimony to the contrary, Lindstrom admitted that he did not look at or calculate levels of zero viewing in the Nielsen data, nor was directed to do so. Tr. at 331:23-332:5. Consequently, Lindstrom could not logically opine that the level of "zero viewing" in the Nielsen custom cable and satellite analyses was "consistent" with his expectations.

MPAA PFF ¶35: The explanation provided by Lindstrom as to "zero viewing" is identical to that provided and rejected in the 1993-1997 cable proceeding (Phase II). 66 Fed. Reg. 66433, at 66450 (Dec. 26, 2001).

MPAA PFF ¶37: Whereas Lindstrom contends that standard levels of "zero viewing" are ostensibly in the 70% range, Lindstrom testified that he is aware of and fully expects that the levels of zero viewing has actually *increased* over time. Exh. 8001 at 357. Levels of "zero viewing" for the 2000-2003 Nielsen diary data is at 94%. See generally, IPG PFF at ¶60. Further, the explanation provided by Lindstrom as to "zero viewing" levels is identical to that provided and rejected in the 1993-1997 cable proceeding (Phase II). 66 Fed. Reg. 66433, at 66450 (Dec. 26, 2001).

MPAA PFF ¶¶40-41: The "selected geographic markets" in which Nielsen household meter data is collected is only in the 56 largest U.S. markets. Tr. at 477:1-16, 181:18-25; Exh. 8002, App. B. Consequently, while Lindstrom attests that meter data is “based on a random sample of people in the United States”, meter data is actually derived from a non-random sample of station data taken from the 56 largest U.S. markets. Tr. at 477:1-16, 181:18-25; Exh. 8002, App. B. MPAA witnesses assert that Nielsen meter data is superior to diary data, while SDC witnesses asserts that Nielsen diary data is superior to meter data. *Cf.* Tr. at 302 (Lindstrom) *with* Exh. 7001 at 13 (Sanders).

MPAA PFF ¶¶44: The MPAA overstates Gray’s experience. According to Gray’s written testimony, Gray served as a consultant to CSOs “to analyze the content and viewership of certain channels”. Exhibit 8002 at 1-2. That is, and contrary to the MPAA assertion, at no time has Gray ever testified that he “served as a consultant to CSOs regarding the value of programming content on channels carried by their cable systems”, much less the value of retransmitted programming.

MPAA PFF ¶¶45-49: By Dr. Gray’s own admission, his methodology fails to measure “relative market value” *according to CSO/SSOs*, the sole criterion governing distribution. See generally, IPG PFF at Section II.E. Notwithstanding his written testimony, Gray actually constructed his methodology on the incorrect assumption that the willing seller is the copyright owner and the willing buyer is a broadcast station, i.e., *not a CSO/SSO*. Tr. at 454-455, 482. Gray's methodology was based on his previously unexplained assumption that in an unregulated market the copyright owner is selling to the broadcaster, and then the broadcaster would license to the CSO/SSO. Tr. at 455-456, 482. Gray's premise finds no basis in either (i) the actual market or (ii) the hypothetical market that the CRB has sought to replicate. Tr. at 456:12-17; 69 Fed. Reg. 3606, 3613 (Jan. 26, 2004).

MPAA PFF ¶47: Notwithstanding his written testimony that Program Supplier programming is "generally homogenous", Gray *actually* constructed his methodology on the premise that all Program Suppliers programming is *not homogeneous*, as is the purpose for the Program Suppliers category, and attributes "significantly" different values based on the characterization of programming appearing in Tribune Media data. Tr. at 437:24-441:8; Exh. 8002 at 28. See generally, IPG PFF at Section II.D.

MPAA PFF ¶¶48-50, 53-54: See generally, IPG PFF at ¶¶41-46. Gray concludes that viewership ratings are significant because they are what a *broadcaster* considers significant. Tr. at 457. Gray disagrees with the conclusions set forth in the 1998-1999 Cable decision that, *inter alia*, "The Nielsen study was not useful because it measured the wrong thing", because, unlike what the Judges and the Librarian in that proceeding held, Gray believes that viewership ratings is the "ultimate currency". Tr. at 461:13-22, 378:13-16.

Gray is aware that distantly retransmitted viewing has been declining over the last ten to fifteen years, even though distant retransmission fees have gone up the last ten to fifteen years. Tr. at 444:21-445:8. That is, Gray maintains that there is a positive relationship between distant viewing and distant subscribership even though he acknowledges an inverse correlation between distant viewership and distant subscribership.

The MPAA has not presented a witness in this proceeding "with knowledge of CSO/SSO programming", and therefore no such witness capable of confirming whether CSO/SSOs consider viewership ratings significant to their decision to transmit a program, no different than in the 2000-2003 cable proceeding (Phase I). 78 Fed. Reg. 64984, 64992, fn. 28.

Gray prefers his paradigm to the precedent expressed in the 1998-1999 Cable decision, and believes that his paradigm is better. Tr. at 465:9-15.

MPAA PFF ¶51: Despite his rejection of volume as a measure of relative economic value, Gray concedes that "total program volume represents the economic-optimizing CSO and SSO choices and provides a measure of the relative economic value of the programming to the CSOs and SSOs". Exhibit 8002 at 14.

MPAA PFF ¶55: Despite asserting that Gray engages in a "two-step approach to determine relative market value", the first of which is a calculation of volume, no relative comparison of volume of MPAA and IPG programming affects the allocation of royalties proposed by Gray. *Cf.* Exhibit 8002 at 15-16 *with* 29. Gray concedes that his use of viewership as a measure of relative market value fails to take subscriber growth into account. Id.

MPAA PFF ¶56: Gray could not correctly articulate which programs were characterized as part of the Program Suppliers category. Contrary to his written testimony, Gray accorded value to programming in the Program Suppliers category even if it was non-U.S. owned programming broadcast from a Canadian-originated station. *Cf.* Exh. 8002 at 16-21 *with* Tr. at 407:7-16. No calculation was made as to the significance of such error. Further, Gray did not independently investigate the country of origin of a program, but rather relied on an unsubstantiated notation in CRTC logs. Exh. 8002 at 16-21; Tr. at 407:7-16.

MPAA PFF ¶¶57-58, 60: See generally, IPG PFF at ¶¶26-28. Although Gray asserts that he engaged in a "stratified random sampling" to identify cable and satellite retransmitted stations from 2000-2009, in calculating the mathematical relationships Gray did not have Nielsen local ratings data for each of the stations for which Gray had distant viewership data, and for which he sought to predict distant viewership. For example, while Gray sought to predict distant viewership for broadcasts appearing on 122 cable retransmitted stations during 2004, Gray only had local ratings data from 56 markets, and conspicuously failed to clarify what number of the 122 sampled cable retransmitted stations were covered by such markets. *Cf.* Exh. 8002, App. B *with* App. C-1, C-2.

Nielsen local ratings data only exists in larger markets. Consequently, while Gray attested that his study was based on a stratified sample of stations that were being distantly retransmitted, his data was actually derived from a non-random sample of station data taken from the 56 largest U.S. markets. Tr. at 477:1-16, 181:18-25; Exh. 8002, App. B.

In the event that Gray did not have local ratings data for the sampled stations for which he sought to predict distant viewership, Gray imputed the retransmitted broadcasts with the average local rating for programs of the same program type (according to Tribune data) that are being broadcast during one of six daypart timeslots. Exh. 8002 at fn. 41.

MPAA PFF ¶¶61-62: See generally, IPP PFF at Section III.B. The SDC relies on a vastly smaller amount of data to establish a purported local ratings/distant viewership correlation than was *already rejected* when proffered by the MPAA in the initial round of this proceeding.

See generally, IPP PFF at Section III.C. Dr. Erdem misrepresented the existence of a positive correlation between local ratings and distant viewership by revealing in oral testimony that his calculations are based on "annual averages" of multiple broadcasts of a program, not singular broadcasts.

See generally, IPP PFF at Section III.F. In order to establish a local ratings/distant viewership correlation for *satellite* retransmissions, Erdem relied on 2000-2003 distant *cable* data.

See generally, IPP PFF at Section III.I. The SDC has no evidence to demonstrate that local ratings are a valid indicator of distant viewership, and no evidence to demonstrate that ratings for cable retransmitted broadcasts are a valid indicator for satellite retransmitted broadcasts.

MPAA PFF ¶¶63-68, 80, 98: For each of the tables and figures, if there is a situation in which both IPG and the MPAA had a claim for a particular program, Gray "always put that into the MPAA pile" for making his calculation. Tr. at 414:17-25. Gray did not calculate what the figures would be if he had instead accorded a conflicting claim to IPG rather than the MPAA. Tr. at 416:11-16.

Across all programs, using 2000 satellite broadcasts as an example, various metrics used by Gray conclude that IPG is entitled 3.37%, 1.8%, and 1.3% of the 2000 satellite pool. However, Gray's methodology concludes that IPG is entitled only 0.46% of the 2000 satellite pool. Consequently, Gray's methodology concludes that any broadcast of an IPG-represented program received, on average, less than one-third of the viewership of a broadcast of any MPAA-represented program during 2000. Tr. at 413:8-414:13.

MPAA ¶PFF 69: See generally, IPP PFF at Section II.F. The IPG methodology submitted in the initial round of these proceedings also included as indicia (i) distant subscribers to the retransmitted station, (ii) the time of day of the broadcast, and (iii) the fees paid by CSO/SSOs in the year of broadcast. *Order Reopening Record* at 6; Tr. at 435:13-436:14. Notwithstanding, the *Order Reopening Record* criticized IPG's use of the foregoing indicia. *Order Reopening Record* at 6.

MPAA PFF ¶¶71-72: See generally, IPP PFF at Section II.D. Gray unreasonably disregards the premise of the "Program Suppliers" program categorization, and his own stated premise, by injecting impermissible factors (program type, certain types of station affiliation) into his analysis that have an admittedly "significant" effect on the regression analysis and his predicted distant viewership.

According to Gray's written testimony, programming in the Program Suppliers category is "relatively homogenous". Exh. 8002 at fn. 21 (emphasis added). Notwithstanding his written testimony, Gray *actually* constructed his methodology on the premise that all Program Suppliers programming is *not homogeneous*, as is the purpose for the Program Suppliers category, and attributes "significantly" different values based on the characterization of programming appearing in Tribune Media data. Tr. at 437:24-441:8; Exh. 8002 at 28.

Exh. 8002, Appendices D-1 and D-2 at 52, 57-58, reflect the regressions based on twenty-five varieties of Program Suppliers programming other than sports or religious programming. Dramatic differences exist in the multiples applied to different types of Program Suppliers programming. For example, "Health" programming is valued at "-2.436333" versus "Music" programming at "0.905276". Id. at 52.

In addition to utilizing *homogeneous* Program Suppliers programming as *heterogeneous* programming types, and factoring them differently, Gray also factored certain "station affiliations" into his regression analysis. Tr. at 441:9-443:16; Exh. 8002, App. D-1 and D-2 at 51, 57.

Three "station affiliation" alternatives were factored in Gray's regression analysis: network, CW, Independent. Id. Ostensibly, Gray factored in "station affiliation" to his regression analysis *only* because "it was information in the Tribune data", not because he had any particular basis for making such distinction. Tr. at 443:13-16. However, Gray provided no explanation in either his written or oral testimony as to *why* he made the three particular distinctions, when the Tribune data does not separate station affiliations out according to only those three distinctions.

Exh. 8002, Appendices D-1 and D-2 at 51, 57, reflect the regressions based on three different categories of "station affiliation". Dramatic differences exist in the multiples applied to different types of "station affiliation". For example, "Independent" station affiliation is valued at 0.283036, whereas "Network" is valued at -0.433309. Id. at 51.

While not contending a "causal" relationship between local ratings and distant viewership according to "program type" and "station affiliation" metrics, Gray conceded that they "significantly affect" the predicted distant viewership (i.e., "attributed value"). Tr. at 446:9-21.

MPAA PFF ¶74: See response to MPAA ¶¶57-58, 60, above, citing generally, IPG PFF at ¶¶26-28.

MPAA PFF ¶¶75-77: See generally, IPG PFF at Section II.E. Notwithstanding his written testimony, Lindstrom admitted that he did not look at or calculate levels of zero viewing in the Nielsen data, nor was directed to do so. Exh. 8001 at 331:23-332:5.

Despite performing no calculations of zero viewing, Lindstrom testified that he is aware of and fully expects that the levels of zero viewing has actually *increased* over time, since the levels of zero viewing reported in the 1993-1997 cable royalty proceeding (Phase II). Exh. 8001 at 357.

Gray testified that there is a "reasonably high incidence" of zero viewing in both the Nielsen 2000-2003 diary data and Nielsen 2008-2009 People Meter data. Tr. at 418:20-419:3.

As regards the Nielsen 2000-2009 local ratings data, Gray initially testified that the incidence of zero viewing was "not the same magnitude" as the Nielsen 2000-2003 diary data and 2008-2009 People Meter data, but could not articulate the levels. Tr. at 419:8-19. Despite this assertion, and his assertion that "more data is better, almost always", Gray subsequently testified that he had not actually calculated the incidence of zero viewing for the 2000-2009 local ratings data. Tr. at 396:12-14, 421:8-14.

Gray acknowledged that for Nielsen distant diary data, only sixteen weeks of sweeps data was utilized, with approximately 80% average zero viewing. The remaining 36 weeks were accorded no distant viewing. Mathematically, while this constitutes 94% zero viewing (16 weeks x .8 plus 36 weeks x 0.0 / 52 = 94% zero viewing), Gray refused to acknowledge such fact, contending that one "could not count missing information as zeros". Tr. at 427:17-431:16. Notwithstanding, Gray acknowledged that in his methodology the "zeros are not discarded", and are averaged in with the positive figures. Tr. at 475:3-11.

In the 1993-1997 cable proceeding (Phase II), the Librarian noted that:

> "In the future, if MPAA continues to present a Nielsen-based viewer methodology, it needs to present convincing evidence, *backed by testimony of a statistical expert, that demonstrates the causes for the large amounts of zero viewing and explains in detail the effect of the zero viewing on the reliability of the results of the survey*. In addition, *MPAA needs to take steps to improve the measurement of broadcasts in the survey to reduce the number of zero viewing hours*, thereby increasing the reliability of its study."

See 66 Fed. Reg. at 66450 (Dec. 26, 2001). Despite such edict, Lindstrom failed to articulate any steps taken to reduce the number of zero viewing hours appearing in the Nielsen data. Tr. at 355:4-356:19.

Lindstrom could not articulate any means by which the Nielsen data presented in the current proceeding differed from the Nielsen data offered in the 1993-1997 cable proceeding. Tr. at 356:24-357:7.

Gray made no attempt to either explain the cause of "zero viewing", explain the effect on the MPAA methodology, and presented no information demonstrating any efforts made by Nielsen to reduce the "zero viewing" in the Nielsen raw data. Exh. 8002; Tr. at 370-488.

The distribution order in the 1993-1997 cable proceedings (Phase II) was vacated as "moot" in order to facilitate the parties' settlement. Notwithstanding, the order clarified that it "should not be construed as a repudiation of the reasoning in the December 26, 2001 Recommendation and Order." 69 Fed. Reg. 23821, 23822 (Apr. 30, 2004).

MPAA PFF ¶80: See IPG Response to MPAA ¶¶63-68, 80, and 98, above.

MPAA PFF ¶¶81-84: See generally, IPG PFF at Section II.A and II.G. In response to the *Order Reopening Record*, the only change to Gray's analysis was the addition of Nielsen 2008-2009 National People Meter distant viewing data. Tr. at 394:24-395:7. No data was added for calendar years 2004-2007. Tr. at 396:17-21.

MPAA could have performed a National People Meter distant viewing analysis for each of the years 2000-2009, but contended that it was "difficult" but not "impossible" given the three-month timeframe afforded by the Judges following the *Order Reopening Record*. Tr. at 310:6-311:13.

The addition of Nielsen 2008-2009 National People Meter distant viewing data was only for the purpose of calculating mathematical relationships between such distant data and local ratings data, in order to be averaged with Nielsen 2000-2003 diary data utilized for the same purpose (see infra).

Across all programs, if there were a competing claim to a program between IPG and the MPAA, Gray automatically awarded it to the MPAA. Tr. at 414:20-25.

In order to assert a relationship between local ratings and distant viewership, the Gray methodology utilized two disparate types of Nielsen data – diary data and meter data. Exh. 8001 at 4-7; Exh. 8002 at 17-19.

In prior proceedings, a clear edict was set forth that doing so invalidated the purported results of any analysis relying thereon. 1989 Cable Royalty Distribution Proceeding, 57 Fed. Reg. 15286, 15291, 15300 (Apr. 27, 1992).

MPAA PFF ¶¶85-90: See generally, IPG PFF at Section II.A and II.G. Despite being involved in "either a direct or supervisory role" in over 3,000 media asset valuations, Sanders testified that he has never been engaged by a CSO or SSO to advise as to what signal to import. Tr. at 163:12-19, 235:9-236:1. Sanders was admitted as an expert on media interest valuation, but not valuation of the retransmitted programming based on CSO and SSO motivations. Tr. at 164:20-23, 169:3-4, 271:16-20. The Judges allowed Sanders' testimony to the extent that it addressed his "general" expertise in valuation. Tr. at 273:16-22. Sanders asserts that it is "commonsense" that "viewing begets subscribership". Tr. at 175:14-21.

Sanders presents no data to establish a correlation between subscribership and viewership. Exh. 7001; Tr. at 159-262.

Sanders understands that distant cable subscribership has gone up gradually since 1999. Tr. at 213:4-8. Exhibit 9032 is the *Report of Receipts* from the Licensing Division, and demonstrates that retransmission royalties have gradually increased since 1999. Exh. 9032. Notwithstanding, Sanders' written testimony reflects that distant viewership has decreased between 1999 and 2009. Exh. 7001 at 6-9 (Figures 1, 2, and 3); Tr. at 220:19-221:6. That is, Sanders (and the Erdem methodology) maintains that there is a positive relationship between distant viewing and distant subscribership even though he acknowledges an inverse correlation between distant viewership and distant subscribership.

MPAA PFF ¶¶91-97: Following the Judges' exclusion of Michael Egan's designated testimony from the initial round of these proceedings, the only other witness to assert firsthand experience relating to how CSOs or SSOs make programming decisions was Ms. Toby Berlin ("Berlin"), a prior DirecTV employee presented by the SDC. However, in her testimony, Berlin contradicts the makeup and priority of the factors by which

CSO/SSOs value programming. Although Ms. Berlin attests that viewership ratings were critically important to DirecTV's selection of retransmitted stations, DirecTV's lineup is comprised of almost entirely niche cable networks, and when speaking about DirecTV's marketing successes in her written testimony, Ms. Berlin discusses the marketing tactic of targeting niche demographics via the addition of narrow-cast networks of women-oriented, children-focused, foreign language, and religious programming, all of which deliver low ratings by design. Exh. 7002 at 4, 9.

Ms. Berlin further undermines her assertion of the preeminence of ratings in carriage decisions and admits the greater significance to SSOs of subscriber retention by explaining that once a station was carried, it was rarely ever taken off DirecTV, regardless of its ratings. According to Ms. Berlin:

> "[E]very station had some loyal constituency, usually a niche audience. *However small it [audience] might be, we never wanted to have subscribers retaliate by 'churning off' the platform, or discontinuing service*." (emphasis added.)

Exh. 7002 at 7; Exh. 7003 at 83:22-84:17, 132:7-134:1.

According to Berlin, the primary strategy of DirecTV, an SSO, was to duplicate cable's lineup of broadcast stations and cable networks to reach programming parity, add even more niche networks with relatively-low ratings, such as offering an exclusive package of NFL games for die-hard professional football fans. Exh. 7002 at 4-5.

A substantial portion of Berlin's testimony relates to the decision to retransmit signals *locally*, pursuant to 17 U.S.C. §122, and Berlin testified that "local into local" retransmission was "*purely* my area of expertise", i.e., her expertise was not *distant* retransmission. Exh. 7003 at 86:15-22. In connection therewith, Berlin asserts that she "oversaw the launch of 2,100 stations in 143 DMAs", but acknowledged that only approximately 50 were distantly retransmitted. Exh. 7002 at 3; Exh. 7003 at 101:14-20. When Nielsen ratings were consulted, it was for the "overall ratings for a station", not the individual programs. Exh. 7003 at 89:11-90:1. Nevertheless, as a logical matter, SSOs could not rely on Nielsen ratings as a basis for selecting *local* retransmitted programming. This is because a provision of the Satellite Home Viewer Improvement Act provided that if an SSO such as DirecTV wanted to carry any one local station, it was compelled to carry all local stations that requested carriage, a fact Berlin acknowledged. 17 U.S.C. §122; Exh. 7002 at 4 ("Because we had to follow a 'carry one, carry all' local stations rule . . ."). Logically, therefore, there was no place for a consideration of ratings in those retransmission decisions *at all*, even though Ms. Berlin maintained that viewership ratings was a predominate consideration. Because of the "carry one, carry all" rule, the *only* determination of an SSO would be whether the cost of "local into local" retransmission of *all* stations in a DMA would increase the net revenue of the satellite carrier, via retained or increased subscribership, since retransmitting one station locally could result in all stations in the DMA being retransmitted locally.

By contrast to the "2,100 stations" *locally* retransmitted, between 1999 and 2003, DirecTV only *distantly* retransmitted between 9 and 11 stations, and those were *only* stations originating from New York, Los Angeles, and Chicago (WGN). Exh. 7003 at 123:5-8. Between 2004 and 2009, DirecTV only *distantly* retransmitted between 34 and 50 stations. These facts make evident that far less attention was given by DirecTV to *distant* retransmission than *local* retransmission, and only to stations from the most significant markets, another fact conceded by Berlin. Exh. 7003 at 120:12-122:18. Moreover, as far as *distant* retransmissions, a station might still not be capable of distant retransmission to an area unless the recipients qualified as an "unserved household" under FCC rules, i.e., an area not already receiving the particular feed, "no matter how great the ratings might be". Exh. 7003 at 135:7-136:8.

Not only did DirecTV *not* have a formal relationship with Nielsen that resulted in the regular supply of ratings information for review by DirecTV, when DirecTV obtained ratings information it was *local* broadcast ratings information acquired from a variety of sources, i.e. ratings from the local broadcast of the station, not the distant retransmission by DirecTV. Exh. 7003 at 125:12-127:9. As such, any ratings information that might have been considered by DirecTV on an irregular basis related to ratings against an entirely different lineup of programming than was offered by DirecTV, and then only the "overall ratings for a station", not the individual programs, were considered. Exh. 7003 at 89:11-90:1.

Given the foregoing, Berlin's contention as to the significance of Nielsen viewership ratings to an SSO is simply implausible, as a matter of logic, a matter of law, and a matter of DirecTV's actual practice.

MPAA PFF ¶98: See IPG Response to MPAA ¶¶63-68, 80, and 98, above.

MPAA PCL ¶11, fn. 20: The MPAA asserts, without factual or legal basis, that but for its settlement with other Program Supplier claimants, IPG's relative entitlement would have been lessened.

MPAA PCL ¶11, fn. 22, ¶14: The MPAA neglects to explain that the distribution order in the 1993-1997 cable proceedings (Phase II) was vacated as "moot" in order to facilitate the parties' settlement. Notwithstanding, the order clarified that it "should not be construed as a repudiation of the reasoning in the December 26, 2001 Recommendation and Order." 69 Fed. Reg. 23821, 23822 (Apr. 30, 2004). Consequently, and contrary to the MPAA assertion, such determination expressly has "precedential value in this proceeding."

The MPAA further neglects to mention that the 1997 award of 0.212% to IPG, was based on IPG's claim to ten programs on behalf of one claimant, Litton Syndications, as opposed to the 80+ claimants represented for each of the cable royalty years 2004-2009, and 100+ claimants for each of the satellite royalty years for 2000-2009. *Cf.* 66 Fed. Reg. 66433, at 66435, 66454 (Dec. 26, 2001) *with* Preliminary Hearing Order.

MPAA PCL ¶16: Contrary to the MPAA assertion, the MPAA has not "presented essentially the same methodology as presented in the 2000-2003 Cable Phase II Proceeding." Rather, the MPAA has relied on a significantly smaller amount of data, non-contemporaneous with the data for which its seeks to establish correlation, and from a significantly greater variety of sources, to which prior decisions from 1992 already pronounced was not allowable. See *Order Reopening Record*; see generally IPP PFF at Section II.G. The MPAA relies on absolutely no distant ratings data from 2004-2007, only a different variety of distant data from 2008-2009, and consequently has not "fully addressed the questions regarding MPAA's methodology that were raised by the Judges in their [*Order Reopening Record*]". Tr. at 394:24-395:7, 396:17-21.

IPG RESPONSE TO SDC PROPOSED FINDINGS

SDC PFF ¶6: SDC misrepresents the number of claimants in the devotional category on whose behalf IPG initially asserted claims. *Memorandum Opinion and Ruling on Validity and Categorization of Claims* at Exh. A-2 (March 13, 2015).

SDC PFF ¶¶13, 17: The SDC inaccurately asserts that the Erdem methodology "relies on local ratings derived from the Nielsen RODP", without clarifying that such "local ratings" are *imputed* to an unidentified group of programs (i.e., not *actual* Nielsen local ratings), and are merely the "national averages" of local ratings, i.e., not the *broadcast-by-broadcast* or even the *station-by-station* local ratings that are reported by Nielsen and were in the SDC's possession. Exh. 7000 at 14, 15 ("Step 1", "Step 2"); Tr. at 55:7-11, 112:22-113:23, 115:1-6, 119:7-11.

More significantly, ***for the first time in these proceedings***, Erdem clarifies that his attribution of value for 1999-2003 calendar years is based by projecting distant values from *only* the February "sweeps" reports for those years. Tr. at 60:9-23 (Lindstrom). Consequently, IPG's previous critique at IPG PFF at Section III.B. is significantly more dramatic. Not only does the SDC rely on a vastly smaller amount of data to establish a purported local ratings/distant viewership correlation than was *already rejected* when proffered by the MPAA in the initial round of this proceeding, the SDC attributes distant value on the *same data already rejected when proffered by the SDC* in the initial round of this proceeding. See IPG Response to SDC PFF 42-46, infra, citing *Order Reopening Record* at 5; see generally, IPP PFF at Section III.B.

As regards attribution of value for 2004-2009 royalties, Erdem acknowledges that he only relies on data from four "sweeps" periods, no different than in the initial round of these proceedings. As part of the Order Reopening Record, the Judges stated:

> "The Judges reach no decision whether ratings data from *four* sweeps months per year, as opposed to *one*, is sufficient to support a distribution. *The Judges would need to weigh evidence and expert opinion, neither of which is in the existing record, before reaching a conclusion*."

Order Reopening Record at 5 (emphasis added).

Notwithstanding, Erdem (and Sanders) wholly fails to address in any written or oral testimony any basis on which to confirm that those 16 "sweeps" weeks are representative of the remaining 36 weeks of broadcasts, providing zero evidence to address the Judges' articulated concerns.

As a second component to the Erdem methodology, the SDC ambiguously asserts that the "local ratings" are "scaled by the number of distant subscribers receiving each program". In fact, Erdem's written testimony states that (i) a program's national averages of local ratings, are multiplied against (ii) "the number of subscribers for channels the relevant SDC and IPG programs are broadcast on" in order to attribute the program with a distant viewership variable. Exh. 7000 at 15 ("Step 2").

Consequently, there is no evidence or testimony to demonstrate that Erdem accounted for the number of broadcasts of a program on a station when calculating "the number of subscribers for channels" on which the program is broadcast. That is, no evidence or testimony demonstrates that Erdem valued a program differently if it had been retransmitted on a station 100 times versus 1,000 times. Exh. 7000; Tr. at 48-158. See generally, IPP PFF at Section III.D.

SDC PFF ¶15: See IPG Response to MPAA PFF ¶¶85-90, above.

SDC PFF ¶16: The SDC characterize Berlin as a "respected consultant", despite no evidence to such effect, including but not limited to the circumstances of her departure from DirecTV, reviews from DirecTV peers, or reviews from unidentified consulting clients. Notably, Berlin's testimony stands in direct contrast to numerous witnesses cited by the Librarian in the 1998-1999 cable royalty determination (Phase I), and according to contradictions set forth in both her written and oral testimony, her testimony remains implausible. *Distribution of 1998 and 1999 Cable Royalty Funds*, 69 Fed. Reg. 3606 (Jan. 26, 2004); see generally IPG Response to MPAA PFF 91-97, supra.

SDC PFF ¶17: See IPG Response to SDC PFF ¶13, above.

SDC PFF ¶18: The SDC proposed finding is based on speculation. Sanders and Mayhue do not assert firsthand knowledge of any use of the RODP by devotional claimants for "making scheduling and programming decisions". Sanders only expresses familiarity with the "type" of report, and Mayhue speculates as to her "belief" of the RODP use during years prior to her employment with any devotional claimant. Exh. 7001 at 15; Exh. 7005 at ¶4.

SDC PFF ¶¶19-21: See generally, IPP PFF at Section III.E. The Nielsen local ratings data on which the Erdem methodology relies fails to measure all devotional programming, and omits significant IPG-represented programming. Exh. 7000 at 6-7, 16 (fn. 25); Tr. at 59:1-9, 105:8-13.

SDC PFF ¶22: The Erdem methodology bears little relation to the methodology presented by the SDC in the 1999 cable proceeding. In contrast, the Erdem methodology still purports to establish a local viewing/distant viewership correlation for 1999-2009 based on non-contemporaneous data (see *Order Reopening Record* at 4-5), and relies on altogether different types of data in order to either (i) establish a local ratings/distant viewership correlation, or (ii) calculate and attribute a distant viewership value. See generally, IPP PFF at Sections III.A. and III.B. Notwithstanding, the Erdem methodology is similar to the SDC's 1999 cable methodology to the extent that it also relies on MPAA HHVH data with which no SDC witness had any foundational familiarity. Tr. at 62:14-24.

SDC PFF ¶¶24, 27; SDC PCL 51-62: Contrary to the SDC assertion, the SDC still have no basis on which to elect a viewership-based methodology. See generally, IPP PFF at Section III.H.

The SDC rely on the Judges' ruling in the 2000-2003 cable proceeding (Phase I) for the concept that that viewership is "the predominant heuristic" that a CSO would consider. However, such statement misquotes the Judges, wherein the same phrase they held that the Judges:

> "are reluctant to rely solely on viewership data merely because the marginal bundling adjustments are not readily measurable. The Judges must also consider subscriber fees and subscribership levels . . ."

78 Fed. Reg. 64984, 64996 (Oct. 30, 2013).

Moreover, that same cited ruling conceded that the Judges' determination was being made in the absence of any testimony of a witness with knowledge of CSO programming:

> "Dismayingly, none of the parties proffered admissible testimony (written or oral) of a witness with knowledge of CSO programming.

78 Fed. Reg. 64984, 64992, fn. 28 (Oct. 30, 2013).

Further, in no evidence or testimony does Erdem or Sanders attempt to distinguish the decisionmaking process of CSO/SSOs in Phase I proceedings and Phase II proceedings, acknowledging that the Phase I/Phase II dichotomy is an artificial construct for administrative purposes.

Consequently, the Librarian's analysis observing "the devaluation of the Nielsen study" and concluding that any viewership-based analysis "was not useful because it measured the wrong thing", remains as standing precedent for which there has been no articulated response. *Distribution of 1998 and 1999 Cable Royalty Funds*, 69 Fed. Reg. 3606, 3613 (Jan. 26, 2004).

Erdem acknowledges that he "doesn't have the information" to demonstrate that subscribership is tied to viewership, but nevertheless contends "it has got to be tied to viewership". Still, Erdem concedes that "without more data, it is hard to get into the weeds of that analysis." 134:18-138:11. Further, Erdem acknowledges that CSOs do not look at viewership ratings but asserts that there is no better data to distinguish between the value of programs. Tr. at 93:8-95:6. In developing the Erdem methodology, Erdem testified that he just "consulted with John Sanders". Tr. at 99:20-100:1.

In turn, Sanders testified that he has never been engaged by a CSO or SSO to advise as to what signal to import. Tr. at 235:9-236:1. Sanders was admitted as an expert on media interest valuation, but not valuation of the retransmitted programming based on CSO and SSO motivations. Tr. at

164:20-23, 169:3-4, 271:16-20. The Judges allowed Sanders' testimony to the extent that it addressed his "general" expertise in valuation. Tr. at 273:16-22. Sanders asserts that it is "commonsense" that "viewing begets subscribership". Tr. at 175:14-21.

SDC PFF ¶¶25-26, 28: See IPG Response to MPAA PFF ¶¶91-97, above.

SDC PFF ¶¶29-30: MPAA witnesses assert that Nielsen meter data is superior to diary data, while SDC witnesses asserts that Nielsen diary data is superior to meter data. *Cf.* Tr. at 302 (Lindstrom) *with* Exh. 7001 at 13 (Sanders).

Regardless, while the SDC contend that the Nielsen RODP diary data is superior because it is "the only market-level measure of viewership that is available in all markets", the Erdem methodology "does not rely on market level data", i.e., station-by-station or broadcast-by-broadcast data. Rather, Erdem relies on national average local rating measure and, apparently, the aggregated subscribers for retransmitted stations on which a program appears. Tr. at 55:7-11, 115:1-6, 119:7-11; Exh. 7000 at 15 ("Step 2").

SDC PFF ¶31: See generally, IPG PFF at ¶¶83-84.

SDC PFF ¶32: See generally, IPG PFF at ¶¶84-85.

SDC PFF ¶¶32-38: See generally, IPG PFF at Sections III.A., III.B., III.C., III.F., and III.I. See also, IPG Response to MPAA PFF ¶¶91-97, above.

The Erdem methodology is the same methodology as was presented in the initial round of this proceeding, but utilizes additional generalized data, and data that Erdem has no foundational familiarity with.

The SDC relies on a vastly smaller amount of data to establish a purported local ratings/distant viewership correlation than was *already rejected* when proffered by the MPAA in the initial round of this proceeding.

Dr. Erdem misrepresented the existence of a positive correlation between local ratings and distant viewership by revealing in oral testimony that his calculations are based on "annual averages" of multiple broadcasts of a program, not singular broadcasts.

In order to establish a local ratings/distant viewership correlation for *satellite* retransmissions, Erdem relied on 2000-2003 distant *cable* data.

The SDC has no evidence to demonstrate that local ratings are a valid indicator of distant viewership, and no evidence to demonstrate that ratings for cable retransmitted broadcasts are a valid indicator for satellite retransmitted broadcasts.

Berlin's contention as to the significance of Nielsen viewership ratings is simply implausible, as a matter of logic, a matter of law, and a matter of DirecTV's actual practice. Moreover, while the SDC contend that "many of the 'distant' retransmissions are to neighboring markets", such assertion is demonstrably untrue for satellite retransmissions, as evidenced by DirecTV's limited distant retransmission from only a limited number of stations originating from a handful of markets (New York, Los Angeles, and Chicago; supra).

SDC PFF ¶¶39-40: See generally, IPG PFF at ¶84.

SDC PFF ¶¶42-46: ***For the first time in these proceedings***, Erdem clarifies that his attribution of value for 1999-2003 calendar years is based by projecting distant values from *only* the February "sweeps" reports for those years. Tr. at 60:9-23. While Erdem asserts that he could not rely on the R-7 tables because "detail information from the full RODPs was not included", exactly what "detail information" was relied on for the attribution of distant value remains unidentified in any Erdem testimony.

In fact, contrary to his asserted reliance on unidentified "detail information", Erdem clearly stated that his attribution of distant viewership "does not rely on market level data", i.e., station-by-station or broadcast-by-broadcast data. Rather, Erdem relies on national average local rating measure, which appears in the R-7 tables. Tr. at 55:7-11, 115:1-6, 119:7-11; Exh. 7000 at 15 ("Step 2"); Exh. 7005 at R-7 pages.

Consequently, the Erdem methodology fails for the *identical* reason it failed in the initial round, both with regards to 1999-2003 attributions of value, and 2004-2009 attributions of value. In the *Order Reopening Record*, the Judges commented:

> "For 1999 through 2003, Dr. Erdem relies on ratings data from a single month in each year to compute relative market value. The Judges will not rest a determination upon such a slender evidentiary reed."
>
> [fn. 9: The Judges reach no decision whether ratings data from *four* sweeps months per year, as opposed to *one*, is sufficient to support a distribution. The Judges would need to weigh evidence and expert opinion, neither of which is in the existing record, before reaching a conclusion.]

Order Reopening Record at 5.

SDC PCL ¶50: Precedent clarifies that relative market value is to be determined according to the CSO/SSO as the "willing buyer". *Distribution of 1998 and 1999 Cable Royalty Funds*, 69 Fed. Reg. 3606, 3613 (Jan. 26, 2004).

SDC PCL ¶52: See IPG Response to SDC PFF ¶¶24, 27, above.

SDC PCL ¶54: The SDC *again* vacillates in its description of what data was used to attribute distant value, now suggesting that the Erdem methodology utilizes eight R-7 tables from 1999-2003. *Cf.* SDC PFF ¶¶42-46.

SDC PCL ¶¶51-62: See IPG Response to SDC PFF ¶¶22, 24, 27, above.

Respectfully submitted,

Dated: May 18, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2018, a copy of the foregoing was sent by email to the parties listed on the attached Service List, and served by the eCRB system.

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Certificate of Service

I hereby certify that on Friday, May 18, 2018 I provided a true and correct copy of the INDEPENDENT PRODUCERS GROUP’S CONSOLIDATED RESPONSE TO MPAA AND SDC PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW to the following:

MPAA-Represented Program Suppliers, represented by Lucy H Plovnick served via Electronic Service at lhp@msk.com

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Signed: /s/ Brian D Boydston